

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of December, two thousand sixteen.

PRESENT:

José A. Cabranes,
Robert D. Sack,
Richard C. Wesley,
Circuit Judges.

In re Jeremy David Schwartz,

15-90085-am

Attorney.

ORDER OF
GRIEVANCE PANEL

1 Jeremy David Schwartz was admitted to the New York State bar in
2 2005, and to this Court's bar in 2006. Based on his conduct in several
3 criminal appeals in this Court, we directed Schwartz to show cause why

1 disciplinary or other corrective measures should not be imposed on him
2 pursuant to Federal Rules of Appellate Procedure 46(b) and (c) and Second
3 Circuit Local Rule 46.2. Upon due consideration of the conduct
4 described in our prior order (the "Show-Cause Order"), Schwartz's March
5 2016 response to that order, and the additional matters discussed below,
6 it is hereby ORDERED that Schwartz is PUBLICLY REPRIMANDED and BARRED
7 from representing clients in this Court pursuant to the Criminal Justice
8 Act ("CJA") for a six-month period.

9 The relevant conduct is detailed in the Show-Cause Order; the text
10 of that order can be found in the appendix to the present order. In
11 the following paragraphs, we primarily focus on the conduct Schwartz
12 has failed to adequately explain and his continuing misconduct.¹

13 **I. *United States v. Caliz, 13-4755***

14 In *Caliz*, Schwartz represents defendant-appellant Alexi Caliz in
15 his appeal from a criminal judgment sentencing him to, *inter alia*, 60
16 months' imprisonment. Although the appeal commenced in December 2013,
17 and Schwartz's representation in January 2014, Schwartz has yet to
18 either proceed with the appeal (by filing a brief) or terminate the
19 appeal (by moving to withdraw it). Meanwhile, Caliz appears to have

¹ Schwartz's response to the Show-Cause Order was untimely filed. However, Schwartz states that the order was not received until after the deadline for his response. See Response at ¶ 13. For present purposes, we accept Schwartz's assertion about the date of receipt.

1 served more than half of his term of imprisonment without resolution
2 of his direct appeal.

3 Our Show-Cause Order details Schwartz's defaults and his failure
4 to respond to multiple telephone calls through January 2015. While
5 Schwartz states in his response to that order that an unspecified amount
6 of his delay resulted from his need for further information from another
7 attorney and Caliz, *see Response at ¶ 6*, he does not explain why he did
8 not request a stay of the appeal or an extension of time, or contact
9 the Court to discuss the delay or request guidance.

10 Schwartz also suggests that some of his defaults may have resulted
11 from the Court's use of outdated contact information. *Id.* at ¶ 7.
12 However, many of the Court's communications concerned a February 2014
13 order that explicitly stated that the appeal would be dismissed if he
14 did not cure a specified default. *See Caliz*, 13-4755, doc. 14. Even
15 if the Court had made no attempt to contact Schwartz, he himself should
16 have been aware of the February 2014 order since he had an obligation
17 to periodically review the docket. *See In re DeMarco*, 733 F.3d 457,
18 463 (2d Cir. 2013) ("As counsel of record, DeMarco also was directly
19 responsible for ensuring his cases were proceeding in due course, even
20 if his employees or the Court failed to inform him of deadlines, Court
21 directives, or other important information. Although counsel of record
22 need not constantly monitor the Court's docket, counsel cannot allow
23 lengthy periods of time to pass without periodic review.").

1 We further note that Schwartz has not stated when his contact
2 information changed, making it impossible to determine which of the nine
3 telephone messages left for him between April 2014 and January 2015 were
4 delayed or not received due to the outdated contact information.
5 Additionally, while he states that some of the messages were only delayed
6 in reaching him, he does not provide any details about the delays or
7 explain why the delayed messages did not cause him to update his contact
8 information.

9 Perhaps most egregious is Schwartz's failure to act even after our
10 order in this disciplinary proceeding put him on notice that Caliz's
11 appeal remained in limbo. Although Schwartz states in his March 2016
12 response to our Show-Cause Order that Caliz "ultimately decided not to
13 go forward with the appeal," Response at ¶ 9, Schwartz has not moved
14 to withdraw the appeal or otherwise contacted the Court. He also has
15 not responded to telephone messages, or to an order, that postdated his
16 response. On May 4 and June 9, 2016, telephone messages were left for
17 Schwartz informing him that a motion or stipulation of dismissal was
18 necessary, and asking for the status. Schwartz did not respond. On
19 July 27, 2016, an order was entered directing Schwartz to file, within
20 21 days, "either a Local Rule 31.2 scheduling notification proposing
21 a filing date for the brief or a motion to withdraw this appeal that
22 complies with Local Rule 42.2." 2d Cir. 13-4755, doc. 36. Schwartz
23 did not comply. Finally, on August 26, 2016, another telephone message

1 was left for Schwartz noting his failure to respond to the July 27, 2016
2 order and instructing him to contact the Court. Schwartz did not do
3 so.

4 Schwartz's understanding that his client did not wish to proceed
5 with the appeal did not end his obligations to this Court. "[A]n
6 appellant's counsel of record who determines that the appeal will not
7 proceed for any reason is required to inform the Court of the situation
8 and seek to either withdraw the appeal or withdraw as counsel." *In re*
9 *Aranda*, 789 F.3d 48, 52 (2d Cir. 2015) (internal quotation marks
10 omitted). "[C]ounsel may not end the representation of a client without
11 taking affirmative action, or permit the termination of an appeal by
12 allowing its dismissal for lack of prosecution." *In re Payne*, 707 F.3d
13 195, 206 (2d Cir. 2013).

14 **II. Remaining Cases**

15 In *United States v. Rickard*, 12-4164, Schwartz permitted the time
16 period for requesting rehearing to expire before requesting an extension
17 of time to do so; his extension request was denied. In *United States*
18 *v. Marandola*, 11-3809, and *United States v. Eldridge*, 09-4205 and
19 11-5457, Schwartz defaulted on a number of occasions, forcing the Court
20 to make multiple inquiries about the defaults and resulting in orders
21 threatening the dismissal of *Marandola*.

22 Concerning *Rickard*, Schwartz states that he "was busy with other
23 matters" and wanted additional time to consider whether to move for

1 rehearing and to discuss the various options with his client. Response
2 at ¶ 10. He also states that, during the relevant time period, he "was
3 engaged in further plea negotiations with the Government," and that he
4 would not have moved for rehearing even if he had been granted an
5 extension of time. *Id.* However, "[a]n attorney who is evaluating
6 whether an appeal should proceed . . . cannot passively allow deadlines
7 in the appeal to expire during that evaluation process." *In re*
8 *Villanueva*, 633 F. App'x 1, 2 (2d Cir. 2015). If Schwartz had not yet
9 decided whether to move for rehearing, he was required to request an
10 extension of the looming deadline, a stay of the appeal, or advice from
11 the Court. "Simply ignoring the deadline . . . [was] not an option."
12 *Payne*, 707 F.3d at 203-04 (discussing attorney who permitted briefing
13 deadlines to expire while awaiting stipulations to withdraw his clients'
14 appeals); see also *In re Yan*, 390 F. App'x 18, 20 (2d Cir. 2010) ("[I]f
15 it is unclear whether a client wishes to proceed, an attorney may,
16 depending on the circumstances, request: an extension of time to file
17 his brief, a stay of the appeal, withdrawal as counsel, withdrawal of
18 the appeal, or advice from the Court. [The attorney's] failure to take
19 any of the preceding actions was a disservice to his clients, this Court,
20 and the public.").

21 Concerning *Marandola* and *Eldridge*, Schwartz states that the
22 defaults occurred during a very busy period when he worked for another
23 attorney and had little control over the volume of his assignments. He

1 also states that his present situation is different, as he has increased
2 his staff to ensure compliance with deadlines. See Response at ¶¶
3 11-12. However, as in *Rickard*, Schwartz could have requested
4 extensions of time in *Marandola* and *Eldridge* with little investment of
5 time, or sought advice from the Court.

6 Additionally, although Schwartz argues that his clients in
7 *Marandola* and *Eldridge* suffered no prejudice because their appeals were
8 ultimately decided on the merits, *id.*, his defaults exposed them to the
9 risk of severe prejudice, the dismissal of their appeals, see *Aranda*,
10 789 F.3d at 51; *In re DeMell*, 589 F.3d 569, 573 (2d Cir. 2009).

11 **III. Prior Disciplinary Matter**

12 In April 2009, a magistrate judge in the United States District
13 Court for the Western District of New York ordered Schwartz to show cause
14 why he should not be disciplined for failing to appear at a scheduled
15 hearing. Schwartz has provided this Court with a copy of the magistrate
16 judge's order to show cause, and a docket sheet entry reflecting, in
17 summary fashion, the magistrate judge's decision not to impose
18 discipline. However, it appears that Schwartz's response to that order
19 to show cause, and the magistrate judge's reasons for not imposing
20 discipline, were only orally discussed at a hearing and never reduced
21 to writing. Schwartz has not described either.

22 Schwartz does not suggest that he had a legitimate excuse for the
23 conduct at issue in the magistrate judge's order to show cause.

1 However, we accord no weight to that prior disciplinary proceeding.
2 Although Schwartz should have provided us with at least a summary of
3 his response to the magistrate judge's order, and of the magistrate
4 judge's dispositive decision, it is unlikely that the additional
5 information would alter the result of the present proceeding.

6 **IV. Mitigating and Aggravating Factors**

7 Schwartz does not explicitly identify any mitigating
8 circumstances. However, as noted above, he does state that his
9 representation of the appellants in *Marandola* and *Eldridge* occurred
10 while he was "in the midst of working for a very busy practitioner with
11 little control of the volume of [his] assignments." Response at ¶ 12.
12 An attorney's culpability for defaulting on obligations to the Court,
13 and for neglecting his clients' interests, may be mitigated if his
14 employer caused him to engage in the misconduct by, for example,
15 assigning a caseload that could not be handled in timely fashion. Cf.
16 *In re Tustaniwsky*, 758 F.3d 179, 182 (2d Cir. 2014) (stating that
17 attorney's culpability was "somewhat mitigated, to the extent he engaged
18 in the misconduct only because instructed to do so by his employer);
19 *In re Hemlock*, 52 A.D.2d 248, 250-51, 383 N.Y.S.2d 600, 602 (1st Dep't
20 1976) (finding, in mitigation, that junior partner only acted as an
21 "amanuensis" under the direction of a senior partner "who set firm
22 policy, established fees, and directed the other attorneys in their
23 work").

1 But we see no basis for mitigation in the present case. There is
2 no suggestion that Schwartz, for example, discussed the problem with
3 his employer, resisted additional assignments, requested assistance
4 with his caseload, or resigned once it became plain that his caseload
5 would not permit him to comply with his ethical obligations. See
6 *Tustaniwsky*, 758 F.3d at 183 (finding minimal mitigation where there
7 was no indication that attorney, "for example, discussed the ethics
8 issue with his employer, resisted his employer's instructions in any
9 way, attempted to mitigate the effect of those instructions, sought
10 advice from anyone, or reported the matter to the Court or any bar
11 authority"); see also New York Rule of Professional Conduct 5.2(a) ("A
12 lawyer is bound by these Rules notwithstanding that the lawyer acted
13 at the direction of another person"; rule effective as of April 1, 2009);
14 New York Code of Professional Responsibility, Disciplinary Rule 1-
15 104(E) (essentially identical rule; in effect prior to April 1, 2009).

16 There are at least two significant aggravating factors. First,
17 our order to show cause put Schwartz on notice of the Court's concerns,
18 but he has failed to alter his behavior. He remains in default in *Caliz*,
19 and remains unresponsive to messages and an order of the Court.
20 Although he states in his response that, as of January 2015, he increased
21 his staff, decreased his caseload, and "hired an associate as an
22 independent contractor to ensure that no important messages or work is

1 missed," Response at ¶¶ 8, 11, 14, those remedial measures have clearly
2 failed.

3 Second, the fact that Schwartz's misconduct occurred in criminal
4 appeals, where important liberty interests are at stake, also must be
5 considered a significant aggravating factor. See *Aranda*, 789 F.3d at
6 59.

7 **v. Conclusion**

8 Upon due consideration of the conduct described in our Show-Cause
9 Order, Schwartz's response, and the aggravating factors discussed
10 above, particularly his continuing misconduct, it is hereby ordered that
11 Schwartz is publicly reprimanded and barred from representing clients
12 in this Court pursuant to the CJA for a six-month period.²

² See *In re Castillo*, 645 F. App'x 41 (2d Cir. 2016) (imposing public reprimand and two-year bar on representing litigants in this Court under the CJA, based on, *inter alia*: defaults and failure to respond to Court communications in two criminal appeals; failure to cure a default after it was identified in Grievance Panel's order; and failure to alter behavior after prior private reprimand put him on notice of Court's concerns about his defaults in a prior criminal appeal); *In re Skyers*, 382 F. App'x 11 (2d Cir. 2010) (imposing public reprimand and two-year bar on representing litigants in this Court under the CJA, based on, *inter alia*: defaults in two criminal appeals; failure to respond to multiple inquiries from the Court concerning those cases; failure to properly respond to the Court's order to show cause why he should not be disciplined; and significant reprimand history); *In re Kestenband*, 366 F. App'x 305 (2d Cir. 2010)(same discipline imposed, based on multiple defaults in seven criminal appeals); *In re Kulcsar*, 417 F. App'x 15 (2d Cir. 2011) (imposing six-month suspension, followed by one-year bar on representing litigants in this Court under the CJA, based on, *inter alia*: defaults in a number of criminal appeals, resulting in the dismissal of five of those appeals; failure to respond to numerous Court

1 It is further ORDERED as follows:

2 (a) The six-month bar on CJA representation in this Court will
3 commence twenty-eight days from the date of this decision.
4 Schwartz may file any briefs that currently have filing
5 deadlines falling within the next twenty-eight days, and may
6 see through to completion any case in this Court in which his
7 brief has been filed by the end of that twenty-eight day
8 period. However, any panel presiding over a case in which
9 Schwartz is representing a party is free to reconsider his
10 continued representation.

11 (b) The six-month bar on CJA representation in this Court
12 applies regardless of the court making the CJA appointment.
13 If Schwartz is mistakenly continued as CJA counsel in any case
14 in this Court during that period, he must promptly notify this
15 Court of the need for substitution. The present order does
16 not bar Schwartz from CJA representation of clients in the
17 district courts.

18 (c) Regarding *Caliz*, Schwartz must do one of the following
19 within 14 days of the date of this order: (1) move to withdraw
20 *Caliz*'s appeal if, in fact, *Caliz* does not wish to proceed;
21 (2) cure all current defaults, if *Caliz* wishes to proceed with
22 Schwartz as counsel; or (3) withdraw from the representation,
23 if *Caliz* wishes to proceed but Schwartz is unable to do so
24 for any reason. Any motion to withdraw the appeal or to
25 withdraw as counsel must comply with this Court's Local Rules.

26 Failure to comply with any of the above directives will result in the
27 imposition of additional discipline, including the possibility of
28 suspension.

29 The Clerk of Court is directed to release this decision to the
30 public by posting it on this Court's web site and providing copies to

communications; violation of duty of diligence; and violation of CJA
rules requiring counsel to continue representation until granted leave
to withdraw and prohibiting delegation of tasks to non-employees).

1 the public in the same manner as all other unpublished decisions of this
2 Court, and to serve a copy on Schwartz, the attorney disciplinary
3 committees for the New York State Appellate Division, Fourth Department,
4 and the United States District Court for the Western District of New
5 York, and all other courts and jurisdictions to which this Court
6 distributes disciplinary decisions in the ordinary course.³

7 FOR THE COURT:
8 Catherine O'Hagan Wolfe, Clerk

³ Counsel to this panel is authorized to provide, upon request, all documents from the record of this proceeding to other attorney disciplinary authorities. While we request that those documents remain confidential to the extent circumstances allow, we of course leave to the discretion of those disciplinary authorities the decision of whether specific documents, or portions of documents, should be made available to any person or the public.

APPENDIX : TEXT OF SHOW-CAUSE ORDER

For the reasons that follow, Jeremy David Schwartz is ordered to show cause why disciplinary or other corrective measures should not be imposed on him pursuant to Federal Rules of Appellate Procedure 46(b) and (c) and Second Circuit Local Rule 46.2. Schwartz was referred to this panel as a result of his conduct in *United States v. Caliz*, No. 13-4755, *United States v. Rickard*, No. 12-4164, *United States v. Marandola*, No. 11-3809, and *United States v. Eldridge*, No. 09-4205.

In *United States v. Caliz*, No. 13-4755, Schwartz represents defendant-appellant Alexi Caliz in his appeal from a criminal judgment sentencing him to, *inter alia*, 60 months' imprisonment. In February 2014, the Court notified Schwartz that he was in default concerning the filing of this Court's Form B, and threatened dismissal of the appeal if the form was not filed by a set deadline; Schwartz complied with that order, and indicated in the form that he was awaiting the preparation of transcripts for various district court proceedings. See *Caliz*, No. 13-4755, at docs. 14-15. Because the transcripts were not filed within the period provided by Second Circuit Local Rule 11.3(a), Schwartz was required to notify the Court of that fact and to periodically provide a status update. See Local Rule 11.3(c). Schwartz failed to do so. After the Court left five telephone messages for Schwartz concerning the missing transcript status updates in April through August 2014, *id.*, at entries 19-22, 24, Schwartz informed the Court in a September 2014 letter that he and his client were "considering whether to go forward or file a notice withdrawing the appeal," and that additional time was needed because his client was out of state, *id.*, at doc. 25. Schwartz did not explain his failure to respond to the Court's telephone messages in a timely manner, but stated that he would advise the Court as soon as a decision was made about proceeding with the appeal. *Id.* Nothing more was heard from Schwartz. In December 2014 and January 2015, the Court left four more telephone messages for Schwartz; the last message stated that he would be referred to the Grievance Panel if a response was not received by January 20, 2015. Schwartz did not respond, and the appeal has not proceeded.

In *United States v. Rickard*, No. 12-4164, Schwartz permitted the time period for requesting rehearing to expire before requesting an extension of time to do so. See *Rickard*, No. 12-4164, at docs. 67, 69, 71. He stated that the press of other business had prevented him from timely requesting rehearing or an extension of time. *Id.* His request was denied. *Id.*, at doc. 75.

1 In *United States v. Marandola*, No. 11-3809, Schwartz defaulted by
2 failing to timely file two required forms, resulting in orders
3 threatening the dismissal of the appeal. See *Marandola*, No. 11-3809,
4 at docs. 10, 12. Although Schwartz cured both defaults, the second form
5 was filed one day after the deadline set in the relevant default order.
6 *Id.*, at docs. 11, 13. Schwartz also defaulted on his obligation to
7 submit either a transcript status update or scheduling notification.
8 *Id.*, at entry 17 (noting telephone message was left for Schwartz on
9 3/20/12 concerning status update). The docket reflects that Schwartz
10 did not cure that default until nearly one month later. *Id.*, at doc.
11 18 (scheduling notification filed 4/16/12).

12

13 In *United States v. Eldridge*, No. 09-4205 (later proceedings
14 docketed under 11-5457), Schwartz failed to file several of the required
15 periodic transcript status updates, forcing the Court to telephone him
16 on three occasions to inquire about the updates. See *Eldridge*, No.
17 09-4205, at entries for 4/14/10, 5/12/10, 6/14/10. In July 2010, based
18 on Schwartz's final transcript status update default, the Court set a
19 briefing deadline *sua sponte*. *Id.*, at entry for 7/6/10.

20

21 Schwartz represented Eldridge pursuant to the Criminal Justice
22 Act. *Id.*, at entry for 1/8/10. All four of the above-described appeals
23 were from criminal proceedings in the United States District Court for
24 the Western District of New York.

25

Finally, we note that the New York State attorney registration web site states that Schwartz's registration expired in January 2015.

28

29

[remainder of order omitted]